

PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Business Meeting
August 21, 2006
Department of Environmental Quality
Metcalf Building Room 111, 1520 East 6th Avenue
Helena, MT

Members in attendance were Theresa Blazicevich, Frank Boucher, Greg Cross, Roger Noble, Shaun Peterson, and Steve Michels. Also in attendance were Terry Wadsworth, Executive Director, and Paul Johnson, Board attorney.

Presiding Officer Cross called the meeting to order at 9:59 a.m.

Presiding Officer Cross welcomed members of the Montana Conservation Corp to the meeting. The group attended the Board meeting to fulfill the AmeriCorps requirement to attend a public meeting on a subject of interest to the group.

Presiding Officer Cross welcomed Steve Michels, of Raynesford, to the Board. Mr. Michels was appointed to replace Frank Schumacher as a representative of the service station dealers. His term expires June 30, 2009. Mr. Cross also noted that Adele Michels of Plentywood has been asked to serve as a representative of the public.

Mr. Wadsworth stated that the Board needs to elect a new Vice Presiding Officer.

Shaun Peterson nominated Roger Noble. Frank Boucher seconded the nomination. **The motion was unanimously approved.**

Approval of Minutes

Mr. Boucher moved to accept the minutes of the June 26, 2006 Board meeting. Mr. Peterson seconded. **The motion was approved.**

Claim Adjustment Dispute – 20060420F – I-90 Exxon, Fac ID #16-08190, Bozeman

Mr. Wadsworth stated that the owner requested that this matter be postponed until the October 16, 2006 meeting. The Presiding Officer agreed and the matter was postponed.

Claim Adjustment Dispute – 20060726O – Stacey Oil, Fac ID #15-04428, Whitefish

Mr. Wadsworth presented a summary of the issue in this matter. An administrative order was issued on March 13, 2006 for failure to conduct release detection and maintain release detection records. The order indicates a compliance inspection was conducted in October, 2005 that noted monthly release detection monitoring was not being performed on the 500-gallon heating oil tank. In November 2005 the Department sent a warning letter notifying Stacey Oil of the violations, along with a corrective action plan for correcting the violations, and a deadline of December 31, 2005. In March 2006 an administrative order was sent, noting the failure to conduct release detection monitoring every thirty days and to maintain one year of monitoring records. On August 9, 2006 the administrative order was satisfied. The law applicable to this matter is 75-11-309, requiring an owner to remain in compliance with applicable rules. Violation of those rules and issuance of an administrative order initiate ARM 17.58.336, which contains a schedule of penalties based on the length of time a violation remains uncorrected after receipt of an administrative order. In this matter the time involved is between issuance of the administrative order and satisfaction of the order is March 13, 2006, to August 9, 2006. Based on the administrative rules, the Board staff is recommending a 75% reduction in reimbursement for the remainder of claims for this particular release.

Alan Stine, Olympus Technical Services, addressed the Board on behalf of Stacey Oil. Don Gray, the owner, was not able to attend. Paul Johannsen, a representative of the new owner of the property, was present. The site had six USTs, two gasoline tanks, three diesel tanks and one heating oil tank. The violation citation was on the heating oil UST. The release occurred from one of the gasoline USTs. The heating oil tank was on a card-lock and could not be shut down for the 36 hours required for manual tank gauging. Weekly inventory control records were being used to ensure that the tank was not leaking. Once the October 2005 inspection revealed the violation, Stacey began manual tank gauging in early November 2005. The tank was shut down on weekends to accomplish the tank gauging, and as a result product could not be sold during those periods. While Stacey began the gauging as soon as they knew it was required, it takes a year of record-keeping to achieve compliance with the requirement to maintain a year's worth of records.

The UST was closed on July 18, 2006 as part of the property transfer. As a result the facility came into compliance. Had the tank not been closed, the facility would not have been able to achieve compliance in a time frame that allowed for any reimbursement from the fund. Mr. Stine believes the penalty imposed in this case goes beyond the intent of the reimbursement rules. While Stacey took immediate action to achieve compliance, they could not do so in a time frame that allowed them to get reimbursement.

Mr. Stine stated that he understands the Board may review the circumstances of a violation letter, including where the violation occurred, whether it was corrected and when it was corrected, and adjust the percentage of the penalty. He reviewed the reasons he feels Stacey Oil should be granted 100% reimbursement. In this case the noncompliance did not present an increase threat to health or the environment. When the tanks at the site were closed, closure samples were taken and showed the only contamination present was at the pump island, while the heating oil tank was on the other side of the building.

Mr. Peterson asked for confirmation that the heating oil tank and violation had nothing to do with the release. Mr. Stine confirmed that the release was discovered in the early 1990's and was related to gasoline tanks.

Mr. Stine stated there has been no additional cost to the fund from the violation. In addition, the delay in compliance was caused by circumstances outside the control of the owner. Stacey attempted to come into compliance as quickly as possible, including beginning manual tank gauging before the warning letter was issued, but were unable to come into compliance for a year.

Mr. Cross asked whether it was accurate to say that the tank gauging involved in the violation was related only to the heating oil tank, and that Stacey could not come into compliance sooner because a full year of record keeping is required to be in compliance. Mr. Stine agreed.

Mr. Peterson asked, with regard to Stacey's non-compliance being out of their control, whether they should have been conducting manual tank gauging as a matter of course. Mr. Stine agreed that the requirement was already in place, but that Stacey did not realize it applied to the heating oil tank as well as the gasoline and diesel fuel tanks. Once they began keeping those records, they could not come into compliance in less than a year. In addition, Stacey was conducting inventory control, but it wasn't the right kind of inventory control.

Mr. Peterson asked for clarification of the legislative intent behind the relevant section of the law and rule in this matter.

Mr. Wadsworth stated that there are many factors involved in this matter. It is difficult for an owner to come into compliance immediately when a complete year of records is required. However, the owner was out of compliance for a period of time before the inspection and notification of non-compliance. As well, there was a period of several months between the notification of non-compliance and the issuance of the violation letter that triggered the law. The Board may wish to look at the actual time of non-compliance, as well as the time required to achieve compliance after issuance of the violation letter.

Mr. Boucher asked for clarification of the dollar amount involved in the claim. Mr. Wadsworth noted the site is eligible up to \$982,500, and that approximately \$94,000 has been spent on the site to date. The staff is recommending that 25% of all future costs be paid, meaning that only 25% of the remaining approximately \$900,000 allowance would be paid.

Mr. Stine noted that there are numerous releases from other sites in the immediate vicinity of this site and there is some question whether all the contamination remaining under the pump island is from the release on this site. As a result of the sale of the property, the current building and islands will be removed and there will be an opportunistic dig-out in the near future. The estimated cost for the dig-out is \$200,000.

Ronna Alexander, Executive Director, Petroleum Marketers Association, stated that she believed the intent of suspending eligibility was to look at each leak and cleanup separately, not at the whole site. In addition, it is probably not a good idea to set precedent when there is also a change of ownership involved. She believes this circumstance goes outside the intent of what was meant when the law and rule were changed. She recommends postponing a decision until the situation can be reviewed by Board counsel.

Lee Bruner addressed the Board. He reminded the Board that originally, if an owner fell out of compliance he lost eligibility altogether and the change in law and rule were an attempt to create a less draconian penalty. An attempt was made to leave the Board some discretion to evaluate the factors involved in each case. He encouraged the Board to use its discretion.

Dan Kenney, Enforcement Specialist, DEQ, provided the Board with an explanation of the process involved in issuance of an administrative order and guidelines on milestones to evaluate when determining a course of action. After an enforcement request is made, the target is to issue an administrative order within 120 days of director's approval of an enforcement request. As a result there is a gap between when a warning letter goes out, when a re-inspection occurs, when a violation letter is sent, and when an administrative order is issued.

He suggested that to evaluate compliance with an administrative order, look at the initial target dates in the order and see if the owner met them. Did they submit the first months of records within 30 days, as required? How quickly do people come into compliance and cooperate with the Department? When did they submit the penalty? In most instances, under an administrative order people cannot meet the target dates specified in ARM 17.58.336.

Presiding Officer Cross asked Mr. Johannsen if he understood the implications of the rule. Mr. Johannsen acknowledged that he did understand. The building is to be demolished in the near future, and the dig-out will occur after that, depending on the results of the Board meeting.

Presiding Officer Cross instructed the Board that there were several options available: approve the staff recommendation, reject the recommendation, adjust the recommendation, or postpone a decision.

Mr. Wadsworth mentioned that the Board staff recommendation is based upon the strict letter of the law. He recommended the Board consider how long the owner was out of compliance, how quickly they paid the penalty, how quickly they responded to the administrative order, what caused the administrative order, and how long was the owner actually out of compliance prior to receiving the administrative order.

Mr. Kenney noted that the penalty was paid within the 45 days that was required by the order. Leak detection records were submitted within the required 30 days. The initial submittal was not sufficient, but as soon as they were notified of what exactly was required, those records were initiated and submitted.

Presiding Officer Cross asked for a motion to accept the Board staff's recommendation to reduce all future reimbursements to 25% of eligible costs. There was no motion offered.

Presiding Officer Cross asked if there was a motion to adjust the reimbursement to a different percentage.

Mr. Peterson asked for clarification that all future claims would be reimbursed at the adjusted rate. Mr. Wadsworth confirmed that all future claims would be adjusted to whatever percentage the Board determines.

Mr. Peterson moved to reject the Board staff recommendation, grant reimbursement and waive the penalty. The non-compliance was not related to the release. There was debate on the motion.

Mr. Peterson made a new motion to reject the staff's recommendation. Mr. Michels seconded. **The motion was unanimously approved.**

Presiding Officer Cross asked for a motion to adjust the reimbursement schedule. A discussion followed regarding the details of the administrative order. Actions of the owner/operator associated with the administrative order had not increased the threat to public health or the environment. The owner/operator was checking the tank; however, actions did not meet UST program requirements. Immediate full compliance was not possible and the delay in compliance was caused by circumstances outside the control of the owner/operator. The owner/operator paid the administrative penalty within the time stipulated by the order. The owner/operator submitted monitoring records within the 30 days as required by the order. The owner/operator cooperated fully with the Department. The order was related to tank operation not to release activity. Subsequent tank gauging indicated that there was loss of product from the tank. Sampling conducted at tank closure did not detect VPH or EPH, indicating that there had not been a loss of heating oil from the tank. There appeared to be no additional cost to the fund as a result of the non-compliance. *Purposes of the fund include protecting public health and safety and the environment by providing prompt detection and cleanup of petroleum tank releases and to provide owners and operators with incentives to improve petroleum storage tank facilities in order to minimize the likelihood of accidental releases.*

Mr. Boucher moved that the Board reimburse the owner at the 90% level, based on the information that the owner had paid the penalty within the time required by the administrative order and was making every effort to come back into compliance as quickly as possible. Ms. Blazicevich seconded. The vote was four in favor and one opposed. **The motion was approved.**

Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. One facility on the table provided to the Board, Kalispell City Service West, was ratified at the June Board meeting and will not be addressed again. There were eight eligibility applications to be ratified. (See table below). All eight are eligible.

Mr. Peterson moved to ratify the eligibility determinations contained in the eligibility table. Ms. Blazicevich seconded. **The motion was unanimously approved.**

Board Staff Recommendations Pertaining to Eligibility From June 7, 2006 thru August 9, 2006				
Location	Site Name	Facility ID #	DEQ Release # Release Month-Year	Eligibility Determination – Staff Recommendation Date
Darby	Former Kepferle Mercantile	48-01246	2282 Jul 1994	Eligible – April 26, 2006
Butte	Kum & Go	34-11741	4471 Feb 2006	Eligible – May 8, 2006
Saco	Conomart Superstore #5	56-06967	4465 Jan 2006	Eligible – May 6, 2006
Billings	NaRa Oriental Restaurant	56-13636	4483 Oct 2005	Eligible – May 24, 2006
Victor	Carole Reum residence	99-95011	4421 June 2005	Eligible – May 30, 2006 (Insurance)
Conrad	City Service West	15-02330	1047 Dec 1991	Eligible – June 8, 2006 (Insurance)
Lewistown	Former Main Street Standard Service	99-95028	4484 Mar 2006	Eligible – June 15, 2006
Richey	Johnson Ford	56-00134	4480 Mar 2006	Eligible – June 15, 2006

Claims over \$25,000

Mr. Wadsworth presented the Board with the claims for an amount greater than \$25,000 reviewed since the last Board meeting. (See table below). There are five claims totaling \$233,662.73. All the claims contain costs for monitoring well installation.

Mr. Boucher moved to accept the claims over \$25,000. Mr. Noble seconded. **The motion was unanimously approved.**

Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Reimbursed
Bonner	Stimson Lumber Company	32-04262	20060705K	\$45,565.71	\$45,565.71
Bonner	Stimson Lumber Company	32-04262	20060705L	\$86,290.77	\$81,640.77
Superior	Superior Junior High School	31-12451	20060705M	\$32,483.49	\$32,483.49
Superior	Superior High School	31-01517	20060705N	\$32,483.48	\$32,483.48
Superior	Town Pump Inc	31-08719	20060721D	\$41,489.28	\$41,489.28
Total					\$233,662.73

Weekly Reimbursements

Mr. Wadsworth presented to the Board for ratification the summary of weekly claim reimbursements for the weeks of June 21, 2006 through August 9, 2006. (See table below). There were 283 claims, totaling \$861,042.49.

Mr. Wadsworth brought the Board's attention to claim #20060719H in the amount of \$192,525.36, paid during the week of August 2, 2006. This claim was for excavation at the Christensen Residence. He reminded the Board that at its May 2005 meeting the Board authorized the staff to seek approval from the Presiding Officer for costs over \$25,000 at that

facility in the event removal of the structure became necessary to remediate the contamination. Presiding Officer Cross approved these costs.

Mr. Peterson moved to approve the weekly claim reimbursements. Mr. Noble seconded. **The motion was unanimously approved.**

<u>WEEKLY CLAIM REIMBURSEMENTS</u> June 21, 2006 through August 9, 2006		
<u>Week of</u>	<u>Number of Claims</u>	<u>Funds Reimbursed</u>
June 21, 2006	43	\$69,590.78
June 28, 2006	91	\$250,542.94
July 19, 2006	47	\$134,597.67
July 26, 2006	43	\$80,412.77
August 2, 2006	30	\$264,588.11
August 9, 2006	29	\$61,310.22
Total	283	\$861,042.49

Mr. Boucher noted that the dollar amount paid out in claims is rising. He expressed concern for the Fund and its ability to continue to service claims, given the current budget.

Presiding Officer Cross noted that roughly 30% of expenses paid by the fund are for actual cleanup of contamination and 70% for monitoring. He would like to reverse those categories.

Biennial Report to Legislative Auditor and DEQ Director

Mr. Wadsworth provided an update on the status of the biennial report. He noted that a draft of the report had been provided to the members of the Board for comment and correction. The Legislative Audit Division has asked that an Executive Summary be included in the final version. In addition, Mr. Wadsworth received comments on the report from Frank Schumacher before his term on the Board expired. Mr. Schumacher believes the Fund is vitally important to the cleanup of the environment, which benefits the entire population of Montana. The Fund also allows small business owners the opportunity to remain in business, yet assists large businesses as well. He believes the alternatives of having no Fund available or self-insurance jeopardizes the viability of the small operators. Many small operators are in small communities and may be the sole supplier to the local population. He indicated that the report articulated that point well to the legislative community.

Mr. Wadsworth stated that a final copy of the report is due to the Legislative Auditor following the August 21 Board meeting.

Proposed Legislation

Mr. Wadsworth noted that in previous meetings the Board has discussed several topics that may require legislative action. These include: the need to address the word “immediate” in the law, a possible fee increase, the role of insurance in the fund, and limiting the time for eligibility application.

Mr. Wadsworth stated that the executive planning process within the Department of Environmental Quality is well advanced. Any proposed bills from the Board for the 2007 Legislature must be into that process in the very near future. The other two avenues to propose legislation include having the industry sponsor a bill, or to have a member of the Legislature sponsor a bill. The Legislative Audit Division only takes the lead on legislation that is a result of an audit the Division has performed. The Division would not necessarily oppose a fee increase, but would encourage any legislation to include a fee coupled with a sharing of the burden by the owner/operator, such as a role for insurance or adjustment in the co-pay amount. There is currently a place-holder in the Department’s legislation for Board matters.

Ms. Alexander noted that the Petroleum Marketers Board does not meet until late September. The marketers do not want the Fund to end, in part because they are not convinced that private insurance is consistently available at an affordable rate. A fee increase may not be politically palatable at this time. She can provide more information at the October Board meeting, after the Marketers Board meets in September.

Ms. Olsen noted that the Department will not oppose the Board requesting a fee increase.

Presiding Officer Cross reminded the members that landowner involvement is another matter that must be addressed.

Fund Solvency Subcommittee Report

The Fund Solvency Subcommittee met in early August. Mr. Wadsworth addressed the comments received on the draft travel policy. The staff is now preparing recommended rule changes, rather than establishing a new Board policy. The draft rule changes will be brought to the Board when they are prepared.

The work group is also evaluating a proposed rule on laboratory costs.

Fiscal Report

Mr. Wadsworth presented the Board with the current Fiscal Report. The report includes both the year end report for fiscal year 2006 and the July 2006 report for the first month of fiscal year 2007. He noted that the Board spent approximately \$5 Million on claims for FY2006 and has roughly \$96,000 remaining unspent in the FY06 accrual

Mr. Boucher commented that without the more than \$900,000 from subrogation settlements, the Board overspent its budget by a large amount. It is not good practice to rely on subrogation income. Mr. Wadsworth agreed.

Mr. Boucher asked what happens if the Board receives claims in excess of the funds available. Mr. Wadsworth stated the two options he sees: 1) the Board has the right to pay claims as there is revenue available, meaning that owners and consultants will be left holding large sums of money until revenue becomes available; and 2) borrow money to pay the claims. He noted that the Board does have roughly \$1.6 million in cash in the bank at this point.

Mr. Wadsworth commented that the above-ground storage tank program is a potential liability not addressed in the current budget.

Mr. Peterson noted that the Board was lucky that MDT fees were higher than anticipated and there were large subrogation settlements in FY06. The reason the Board exists is to pay claims, and he is not interested in borrowing money in the future. He would like to hear from the Department at the next Board meeting what can be done to prioritize claims and keep the Board out of trouble financially in the next fiscal year.

Sandi Olsen, Remediation Division Administrator, stated that the Department has a process for prioritizing work plans, but does not have jurisdiction over prioritizing claims.

Presiding Officer Cross noted that if claims are to be prioritized, it has to start before a contractor goes out and starts work that he will not get paid for. The issue is how to look at a site and determine when remediation should start and to what extent. There are more than 1600 sites at this time.

Ms. Olsen said she can bring information to the Board on how work plans are prioritized, and on what is in the pipeline already. She will bring a report of the number of sites in various stages of investigation, cleanup and post cleanup monitoring, but it may not include a dollar amount.

Mr. Peterson noted that there is a finite amount of money available, and the Fund is already projecting a half million dollar deficit. If claims continue on the current trend the Fund will not remain solvent for long. He wants to hear from the Department a financially responsible plan to resolve this situation of claims exceeding available revenues.

Roger Noble noted that some of the huge costs are monitoring costs. The Fund Solvency subcommittee is working to limit those costs, including lab fees and limiting constituents analyzed. In addition, the mileage costs are large, and the subcommittee is working on that aspect as well.

Mr. Wadsworth asked Mr. Peterson if he is asking that the Department come to the October meeting with some help in planning to balance the budget.

Mr. Peterson asked when the proposed budget is set.

Ms. Olsen stated that the legislative budgeting process is well underway. The first printout will be available by the end of August. The Governor's office will propose a budget to the Legislature in printed format by November 15th. The Legislature publishes its proposed budget by December 15th.

Ms. Alexander noted that the Board has the responsibility to look at the budgets regarding the Petro Fund and weigh in on them.

Mr. Peterson recalled that the previous Board chairman was dissatisfied with the fact that the last proposed budget was presented to the Board too late for any meaningful input from the Board. He also asked that the Department's administrative budget be reduced by ten percent each biennium until such time as the administrative costs were below a certain percentage of the overall budget.

Ms. Olsen stated that Mr. Wadsworth should be able to provide the initial budget to the Board by the end of August. Part of the budget process is for agencies to propose decision packages for their budget that reflect desired program changes. The budget review provisions are intended to give the Board an opportunity to review those decision packages. The packages were due back in May, 2006. The Department has not proposed any decision packages that would change program direction, nor any new FTE's. The Department has proposed fully funding positions that were vacant.

Board Attorney Report

Paul Johnson, Board attorney, stated that the Town Pump case record has been fully submitted to the First Judicial District Court. Town Pump's initial brief is due to the court by September 11, 2006. The Board's answer brief is due by October 11, 2006. Town Pump's reply is due October 25, 2006.

Mr. Johnson departed the meeting at 11:15 a.m.

Board Staff Report

Mr. Wadsworth presented the Board staff report. He noted that there are 22 pending eligibilities. Several were ratified earlier in the meeting and will be removed from the chart in the October meeting.

Mr. Wadsworth stated that the dollar value of work plans reviewed in June and July 2006 was significantly higher than those reviewed during the same two months in 2005. He noted that the staff still has many work plans in process that have not been reviewed.

Presiding Officer Cross noted that the work plans shown on the charts are an example of work that is already in process and the claims for the work will be coming in sometime in the future.

Ms. Olsen noted that a lot of the activity seen in the chart is a result of the recent emphasis on streamlining what the Petroleum Release Section does to get more work done in order to get to cleanup faster. There is a bulge as a result of that effort. There is hope that the effort will stabilize, but it has driven a change and the Department is working with the staff to anticipate what might happen next.

Presiding Officer Cross reiterated that the trend he sees is that 30% of the funds spent are to remove contamination, while 70% is spent on monitoring. That trend must be reversed so that more is spent on cleanup and less on monitoring. There are consistently more than 1600 sites that are active, and monitoring is not moving them to closure. He directed the Board members to notice how many of the work plans contained monitoring and the dollar amounts of those work plans.

Mr. Noble commented that the amount of groundwater monitoring conducted is driven by the water quality non-degradation law that the legislature passed. In order to get a grip on the costs for monitoring, the state will likely need to move to a risk based corrective action system, such as that in place in Idaho.

Mr. Wadsworth presented the table of facilities with current enforcement orders to the Board, noting that this is a new component of the staff report.

Presiding Officer Cross asked that a city be added to each facility listed.

Mr. Rule suggested adding a summary of the violations to the table.

Petroleum Release Section Report

Mr. Trombetta provided a brief summary of clean-up efforts at the Christensen residence release, as requested by the Board at its June meeting.

In other matters, 29 new releases have been discovered this year, while 26 have been resolved. He noted that there are 1651 sites that are considered active, though only a fraction of those are subject to currently active work plans. The Department has recently hired a new closure specialist, who is working to bring additional sites to closure.

Public Forum

Ronna Alexander, Petroleum Marketers Association, addressed the Board and stated that the Board has a statutory responsibility to take an active role in determining the Department's portion of the Board budget. With the 2007 legislative session approaching, the Board must determine whether it will support or testify against the Department's portion of House Bill 2 when it is submitted to the Legislature

The next scheduled Board meeting is October 16, 2006, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, MT.

Meeting adjourned at 12:27 p.m.

Greg Cross - Presiding Officer